No. 83-18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

REPLY BRIEF OF PETITIONER

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The issue before the Court is whether the First Amendment limits awards of presumed and punitive damages against "non-media" defendants in actions for defamation. D&B has urged the Court to confirm that the First Amendment protects all speakers against awards of presumed and punitive damages, absent proof of actual malice. By doing so, the Court would hardly sound the "death knell of reputational interests of our citizenry." (Respondent's Brief at 12) The limited holding sought here would not do away with the law of libel, nor would it prevent private defamation plaintiffs from recovering damages for actual injury. Despite Greenmoss' obfuscation, D&B seeks only the same result required in defamation cases brought against newspaper publishers, magazine distributors, and television broadcasters.

What D&B urges is not a sweeping change in First Amendment doctrine. A ruling in favor of D&B would, instead, flow naturally from the Court's holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the Court recognized that absent proof of knowing falsity or reckless disregard for the truth, the states' interest in awarding damages for defamation extends no farther than compensation for actual injury.

Unable to explain why the states' interest is somehow more extensive here than it was in *Gertz*, Greenmoss has tried to obscure the issue by suggesting an expanded view of "commercial speech" and by otherwise contending that the First Amendment does not apply to reports of bankruptcy and other financial matters. In the process, Greenmoss makes little mention of its $350,000 verdict, no doubt recognizing that

a verdict of that size is insupportable under the circumstances of this case.

As demonstrated below, Greenmoss' arguments against First Amendment limitations on presumed and punitive damages are unacceptable. Rather than importing the unsettled doctrine of "commercial speech" into the law of defamation, and rather than making a constitutional distinction between the press and other members of the public, the Court should confirm that the Constitution's limitations on presumed and punitive damages apply in the same fashion to all speakers. The judgment of the Vermont Supreme Court should therefore be reversed.

I.

NO STATE INTEREST JUSTIFIES THE AWARD OF PRESUMED AND PUNITIVE DAMAGES AGAINST A "NON-MEDIA" DEFENDANT ABSENT ACTUAL MALICE.

A. The Award of Presumed Damages in This Case Has Not Been Justified and Cannot Be Supported.

In this case, Greenmoss sued D&B for $7,500 actual damages and $15,000 punitive damages following a false report of bankruptcy.[1] (J.A. 5-7) After a two-day trial, the jury returned a $350,000 verdict for Greenmoss, many times the company's net worth. That

[1] Following the report of bankruptcy, D&B promptly issued a retraction in the form of a "Correction Notice" (J.A. 15) explaining the error and advising that the bankruptcy petition had been filed by an employee of Greenmoss, and not Greenmoss itself.

award resulted from instructions that gave the jury uncontrolled discretion to assess unlimited amounts of damages without regard to actual injury, without regard to D&B's perception of the truth at the time of its report, and without regard to the fact that D&B had issued a prompt retraction.

Given these facts, Greenmoss makes no mention of presumed damages in its brief, preferring instead to speak vaguely of "the damage issue" and "compensatory damages." (Respondent's Brief at 6) Faced with the Court's holding in *Gertz* that the states have no substantial interest in authorizing presumed damages for defamation in the absence of actual malice, Greenmoss does not even try to make a case for presumed damages. Nor does Greenmoss suggest that there is anything unique about itself that makes presumed damages constitutionally permissible here when the First Amendment requires proof of actual malice elsewhere.[2]

On the other hand, Sunward Corporation ("Sunward"), which has filed an *amicus curiae* brief in support of Greenmoss and which has its own exorbitant presumed damages verdict to protect, extols the virtues of presumed damages as a means of "achieving" the states' interest in protecting private reputation.[3]

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[2] Greenmoss cites the states' general interest in protecting private reputations with no attempt to relate that to the presumed damages component of its verdict. That, of course, is the very interest *Gertz* rejected as a basis for awards of presumed damages.

[3] The $3,847,488 verdict for the plaintiff in *Sunward Corp. v. Dun & Bradstreet, Inc.*, No. 82-K-147 (D. Colo. filed January 27, 1982) is a good example of the kind of unmerited windfall—of staggering proportions—that can result from allowing a defamation case to go to a jury without an instruction that presumed

Yet Sunward wholly fails to explain why the states' interest in compensating plaintiffs should be greater in a case of defamation than in a case of negligent misrep-

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damages may be awarded only upon a finding of knowing falsity or reckless disregard for the truth (with "reckless disregard" defined as "serious doubt as to the truth" as per *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

Sunward's libel claim was based on a D&B report that underestimated Sunward's annual sales and the number of its employees by a substantial percentage. Sunward made no effort to prove any causal connection between the D&B report and a subsequent decline in sales, which the evidence, apparently disregarded by the jury, showed was caused by mismanagement and a decline in the agricultural economy which Sunward served. Instead, Sunward put on the stand its own personnel who testified about rumors of unknown origin that Sunward was in financial difficulty. Sunward's counsel attributed the sales decline to those rumors.

Sunward had available to it through discovery the names of over one hundred recipients of the allegedly defamatory report. (Plaintiffs' trial exhibits 46, 47, 48, 49A and 49B) Sunward's own records contained the names of its 240 salesmen, 1300 dealers, 26 bankers, nearly 100 suppliers and numerous customers—the persons whom, it was argued, might have acted adversely to Sunward as a result of the report or the rumors. Nevertheless, Sunward called not one report recipient, not one salesman, not one dealer, not one banker, not one supplier, and not one customer to testify that the report or any rumor adversely affected their relationship with Sunward.

Instead, Sunward merely introduced evidence of its decline in sales and, like Greenmoss, "projections" of profits it thought it should have made, and relied completely on the doctrine of presumed damages to support its damage claim. The quality of the testimony of the Sunward officers and employees who testified about the rumors and denied that the sales decline had anything to do with the decline in the agricultural market was such that the trial judge, at the hearing on the post-trial motions, commented on the record that had the case been tried to the Court, he would have found for the defendant "because of issues of credibility in the case. . . ." (*Sunward* Post Trial Motions, Transcript at 46-47)

resentation, interference with contract, or fraud, which may involve far more substantial injuries than the damage suggested here. The conduct involved in fraud is far more reprehensible than negligent defamation. Yet Vermont limits recovery for fraud to injury in fact and further requires competent proof of damages.[4] It seems unlikely that Vermont would have any significant interest in permitting presumed damages for negligent defamation, where the defendant's conduct is less culpable.

Sunward contends that presumed damages are needed in defamation cases because defamation plaintiffs may find it difficult to show that a defamatory statement caused a particular loss. Presumed damages are said to be defamation's counterpart to the negligence doctrine of *res ipsa loquitur*. That analogy, however, does not fit. *Res ipsa loquitur* concerns fault, not damage. A negligence plaintiff who relied on the doctrine of *res ipsa loquitur* would still have to prove injury in fact, a requirement that neither Sunward nor Greenmoss have had to meet.

The problem for Sunward and Greenmoss is *not* that actual damage is difficult to trace to D&B; it is that actual damage simply does not exist. There are

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[4] A Vermont plaintiff who seeks compensation for fraud is only "entitled to 'recover such damages. . . as will compensate him for loss or injury *actually* sustained and place him in the same position that he would have occupied had he not been defrauded.'" *Conover v. Baker*, 134 Vt. 466, 365 A.2d 264, 268 (1976) (emphasis added). In such a case the burden is on the plaintiff "to show, not only that [he has] been damaged by the fraud of the defendant, but also to show facts necessary for the proper and correct computation of damages." *Larochelle v. Komery*, 128 Vt. 262, 261 A.2d 29, 33 (1969).

certainly no causation problems in the case before the Court. The false report at issue was sent to a small, readily identifiable audience. The five recipients of D&B's Special Notice were all presumably available to testify, but none of them were called by Greenmoss. Had the Special Notice caused actual injury, Greenmoss could have shown this by calling one or more of the five recipients.[5]

Sunward's suggestion that presumed damages somehow aid a prospective plaintiff to discover a defamatory publication is particularly inapt. As Greenmoss concedes, it learned of the false report of bankruptcy within days after the Special Notice was first issued. More important, the possibility that a plaintiff may never discover its cause of action is irrelevant to the issue here: namely, the rules of damage to be applied consistently with the First Amendment once an action has been filed.

Whether or not presumed damages effectuate a state's interest in compensating injury to reputation, that interest is no broader here than it was in *Gertz*. Every argument made in support of presumed damages was before the Court in *Gertz*, and all of them were rejected there. *See* 418 U.S. at 376 (White, J., dissenting opinion). While presumed damages may

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[5] It is naive of Sunward to suggest that a plaintiff could never learn the extent to which a D&B report had been distributed. As its district manager testified at trial, D&B records the name of each subscriber who receives a particular report. (Tr. 365) A single interrogatory would elicit this information, and that is precisely what happened in this case. *See* D&B's Answer to Interrogatory No. 11 contained in document entitled "Plaintiffs' Interrogatories to the Defendant and Request to Produce" at 5. The same fact pattern existed in *Sunward*. See Footnote 3, *supra*.

make it easier for plaintiffs to recover damages for defamation, that comes at the cost of overcompensating many, like Greenmoss and Sunward, who have not been injured at all or who have suffered only minor injury at worst. Common law rules presuming injury in fact from proof of a defamatory publication—and permitting uncontrolled arbitrary jury awards of general damages for that presumed injury—impermissibly conflict with the First Amendment. No legitimate state interest justifies this result. *Gertz*, 418 U.S. at 350.

B. The Award of Punitive Damages is Equally Insupportable.

Unable to explain why punitive damages should be any more available against publishers like D&B than against members of the established communications "media," Greenmoss tries to justify its $300,000 punitive damage verdict by pretending that its punitive damages had nothing to do with defamation. Greenmoss posits a state interest in "deterring repeated, harrassing and persistent conduct taken against [its] citizens." (Respondent's Brief at 21) But Greenmoss made no separate claim for repeated, harrassing and persistent conduct in the proceedings below. Its complaint alleged a single cause of action for libel based solely upon the publication of D&B's Special Notice.

Greenmoss' argument that its punitive damages are supportable without regard to its defamation claim is based upon a misreading of the trial court's charge on punitive damages. The trial court permitted the jury to assess D&B's conduct before and after the publication, but *only* in considering whether Defendant acted with actual malice in the first instance. (J.A. 20) The

trial court instructed the jury to award punitive damages only if it found actual malice *in D&B's publication*:

> If you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, *that the Defendant acted with actual malice in publishing the article in question*, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed.

(J.A. 20) (emphasis added). In short, subsequent conduct was to be considered only insofar as it reflected defendant's state of mind when the erroneous report was published. The charge cannot be read as permitting punitive damages without regard to the publication or based on conduct quite apart from the act of publishing the report.*

Greenmoss is equally misguided when it argues that the trial court's instructions on mitigation of damages somehow limited the jury's discretion more here than in *Gertz*. (Respondent's Brief at 21-22) To the contrary, the jury was given complete discretion to assess any amount it chose, however unreasonable. Far from illustrating how a trial court can curb a jury's passions with carefully framed instructions, this case presents a clear example of what troubled the Court in *Gertz*—"punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual

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* Although it utilized the undefined words "actual malice," the trial court failed to charge the actual malice standard of *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964). *See* Brief of Petitioner at 7.

harm caused"[7]—imposed in this case by a jury given free reign to punish an out-of-state corporation whose business the jury did not like.

Recognition that actual malice is a constitutional prerequisite to punitive damages in all defamation cases would prevent unjust, inconsistent verdicts. The different treatment given to the punitive damage issue in *Sunward* highlights the First Amendment problem in this area. As Sunward notes on page 13, n.14, of its brief, the trial judge in *Sunward* withdrew the punitive damage issue from the jury as a result of D&B's prompt notice to subscribers of an error in its reports about Sunward. D&B gave the same prompt notice here, but the trial judge did not feel similarly constrained. Instead, he gave the jury discretion to award punitive damages, placing no limits on that discretion apart from a vague, standardless charge on mitigation. (J.A. 20) An actual malice rule would have caused both cases to be treated alike and would have prevented the arbitrary, excessive verdicts reached.

II.

THE INFORMATION PUBLISHED BY D&B CONCERNING GREENMOSS IS NOT "COMMERCIAL SPEECH."

Avoiding the lack of any legitimate, identifiable state interest to support the award of presumed and punitive damages in this case, Greenmoss simply labels the Special Notice as "commercial speech" and concludes that D&B is unworthy of First Amendment

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[7] 418 U.S. at 350.

protection. The "commercial speech" doctrine, however, has no application to the speech at issue.

Greenmoss admits that D&B's publication was not an advertisement and did not propose a commercial transaction. (Respondent's Brief at 15, 23-24) It also concedes that the publication did not consist of statements made in the economic interest of the speaker. (Respondent's Brief at 23-24) Nothing in the Special Notice promoted the speaker or the speaker's product. D&B's report concerns information about a third party, published to entities with whom D&B already had established a relationship. The hallmarks of "commercial speech" are therefore lacking here.

The "commercial speech" cases decided by the Court have concerned the validity of state regulation of advertising and closely related methods of commercial solicitation. Each recent case in which the Court has refined the contours of "commercial speech" has involved attempts to regulate or prohibit advertising or related commercial activity. None of them has dealt with defamation. Moreover, the factors used to distinguish "commercial speech" from other speech are unique to advertising or promotional activity. *See, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (ban on advertising by pharmacists); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (restrictions on attorney advertising and solicitation); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (attorney advertising and solicitation); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (signs advertising sale of residential property); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (billboard advertising); *Central Hudson Gas & Electric Corp. v. Public Service*

Commission, 447 U.S. 557 (1980) (advertising by a public utility); *Bolger v. Youngs Drug Products Corp.*, ___ U.S. ___, 103 S.Ct. 2875 (1983) (birth control advertisements).[8]

Despite the inapplicability of the "commercial speech" doctrine even under its most expansive interpretation, Greenmoss and Sunward make three arguments for treating the Special Notice as "commercial speech." The first, that the publication lacks constitutional merit merely because it deals with business matters, ignores this Court's decisions to the contrary. *E.g.*, *Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."). The second argument is the equally simplistic claim that publications made for profit must be branded "commercial speech." That claim was discredited more than thirty years ago. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("That books, newspapers, and magazines are

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[8] Greenmoss' discussion of the "hardiness" and "easily verifiable" nature of "commercial speech" has no application here. When the *Central Hudson* Court spoke of "commercial speech" as "hardy," it referred merely to the fact that the speaker has an interest in disseminating messages encouraging participation with him in commercial transactions which renders the speech "not particularly susceptible to being crushed by overbroad regulation." 447 U.S. at 564 n.6. It has also been said that "commercial speech" is easy to verify since it does not depend upon material gathered from outside sources or about other persons, but concerns the speaker's own product or service. Properly understood, these attributes of "commercial speech" thus have no application to the D&B publication at issue.

published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."). Since then, the idea that profit motives are antithetical to the First Amendment has been rejected whenever it has reappeared. *E.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967); *Virginia State Board*, 425 U.S. at 761.

Greenmoss' final argument, that D&B's Special Notice is not of general concern or public interest, harkens back to *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), where a similar public interest notion was brought into the law of defamation. In *Gertz*, of course, that notion was abandoned because it was both overbroad and underinclusive. 418 U.S. at 346. *Rosenbloom's* short-lived "public interest" test failed to produce an acceptable accommodation of constitutional concerns and the interests served by remedies for libel. There is no reason to believe that the *Rosenbloom* approach would have any better results if applied as a means of formulating a "commercial speech" exception to the First Amendment.

For the reasons expressed above, all of the "commercial speech" arguments in this case are fatally flawed.* More important, none of the "commercial

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* It has been argued that a common law qualified privilege available to commercial credit reporting companies in many states would afford adequate protection to D&B. The underlying premise of that argument is that D&B's Special Notice constitutes "commercial speech" and may therefore be assigned a lesser level of protection. Because that premise is false, the argument need not be considered further. The Court should recognize, however, that the qualified privilege argument has no application here, since Vermont does not recognize the privilege. (J.A. 40)

speech" arguments addresses the fundamental issue before the Court. Why should the statement "Greenmoss is bankrupt" be subject to First Amendment limits on presumed and punitive damages when it appears on page 17 of *The Burlington Free Press*, but not when it appears in one of D&B's reports? As the following section shows, no persuasive reason has been offered for a rule that would create vast, speaker-based differences in exposure to damages arising from the same defamatory words.

III.

THE FIRST AMENDMENT DRAWS NO DISTINCTION BETWEEN "MEDIA" AND "NON-MEDIA" DEFENDANTS.

In an effort to explain why "media" defendants should have greater First Amendment rights, Greenmoss argues that the First Amendment protects only speech relevant to "self-government" or to some other arbitrarily chosen set of values. The problems with that argument are set forth in the Brief of Petitioner at 23-27. Greenmoss' analysis also fails to recognize that the content of the message cannot be used to justify a constitutional distinction between "media" and "non-media" speakers. "Media" speech has no monop-

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Furthermore, adopting state law rules of privilege as a means of effectuating the First Amendment would invert the Supremacy Clause, subjecting fundamental constitutional rights to the vagaries of state law. Since standards of conduct necessary to defeat the privilege range from simple negligence through gross negligence to spite, a holding that made state law determinative would lead to conflicting decisions.

oly on the values identified. (Brief of Petitioner at 26-27)

Moreover, the publication dismissed so easily by Greenmoss as a "credit report" plays a central role in the structuring of business relationships, which is what the free flow of business information is all about:

> The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources.[9] Baumol, Economic Theory and Operations Analysis, 249-256 (1961); Braff, Microeconomic Analysis, 259-276 (1969); Dorfman, Prices and Markets 128-136 (3d ed. 1967).
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> The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication. There is no doubt that an adverse credit rating can injure a subject. But one injured can inform his suppliers and creditors that a report is misleading. Indeed, in this case, Dun & Bradstreet, Inc. was willing to print a retraction. It is difficult to credit a claim that the "general damages" suffered by the respondent resulted from the short-term confusion between the mispublication and the retraction. In any event, . . . such speculative costs of unfettered communica-

tion are preferable to the chill upon free expression that the libel laws impose.

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* Presumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811 (1971), arising out of a squabble over whether a vendor had sold obscene magazines.

Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 905-06 (1971) (Douglas, J., dissenting from denial of certiorari).

Here, as in *Gertz*, the Court is not called upon to protect false speech itself but, rather, to tolerate a range of error so that truthful information will not lose its utility. D&B's subscribers depend upon its reports to make business decisions, which often must be made quickly. If a credit applicant suffers a downturn in business while its application for credit is pending, the creditor would want to know that fact immediately. But if D&B were subject to unlimited awards of presumed and punitive damages in the manner of the Greenmoss and Sunward verdicts, D&B would be reluctant to report the applicant's changed financial circumstances, at least until the information could be triple checked. As a result, even though the information might be dispatched to the creditor eventually, it might come too late for the information to be of any practical use.

Greenmoss argues that D&B is wrong in insisting that failure to reverse the lower court's decision would pave the way for *ad hoc*, inconsistent results. Accord-

ing to Greenmoss, it would be an easy matter for the Court to hold that D&B has lesser First Amendment rights than "media" defendants simply because of the medium involved, or, as Sunward puts it, "[a] credit report is a credit report." That argument begs the question. It fails to explain what there is about a credit report that makes it different from other forms of speech. At the same time, it ignores striking similarities between D&B reports and newspapers. Both report on court proceedings. To obtain information, D&B and the newspaper send reporters to the courthouse. Both the D&B reporter and the newspaper reporter summarize facts reflected by court records. Each reporter's information is then reviewed and edited. Both D&B and the newspaper want the information to reach their subscribers without delay, fearing that delay would deprive the information of its utility. Finally, readers of both the newspaper and D&B reports use the information to structure private economic relationships. Given these similarities, it would be anomalous to subject D&B to unlimited exposure to damages for libel while limiting the newspaper's exposure for the very same speech.[11]

Even so, Greenmoss insists that *Gertz* should not apply to "non-media" defendants "since in most non-media cases, particularly those which involve credit reporting agencies common law privileges are usually available." (Respondent's Brief at 31) That argument ignores the fact that no such privilege was available here. It also fails to consider that common law privi-

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[11] Greenmoss' argument that "media"/"non-media" distinctions in presumed and punitive damage limitations are justified by the "of the press" clause in the First Amendment is invalid for reasons expressed at 16-20 of the original Brief of Petitioner.

leges are available to "media" and "non-media" defendants alike. It is a rare case in which a "media" defendant would have no common law privilege to assert against a claim of libel.

Next, Greenmoss argues that plaintiffs defamed by "media" defendants have a "right of reply," but that the "credit reporting medium" affords no opportunity to counteract false statements of fact. Greenmoss is wrong on both counts. First, D&B voluntarily printed a retraction of its false statements about Greenmoss within days after the Special Notice was issued, counteracting the false report. Second, an individual's "right of reply" to "media" defamation is entirely dependent upon the "media" party's willingness to publicize the individual's point of view. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Few letters to the editor actually appear in print.

As a corollary to its right of reply argument, Greenmoss declares that where "non-media" defamation is concerned it would be difficult to discover and correct a false publication. As discussed above, that has nothing to do with the situation here: one who does not discover the source of a defamatory statement does not benefit from presumed and punitive damages because he is not in court. Despite what Greenmoss says, it is far more likely that one of the recipients of a "non-media" publication would alert the defamed party to what had been said. In "non-media" cases the defamed person or entity is also far more likely to be dealing with a small group of suppliers, customers or others who can be contacted easily for the purpose of correcting any false statement made.

In short, Greenmoss does not meet the problems with the "media"/"non-media" distinction, upon which the Vermont Supreme Court based its decision that First Amendment limitations on presumed and punitive damages do not apply to D&B. The distinction is analytically indefensible and unworkable in practice. The distinction cannot be justified, nor can its infirmities be eclipsed, by *ad hoc* and inaccurate characterization of the nature of the particular speech at issue here. To the contrary, the arguments contained in Greenmoss' brief furnish a perfect example of the morass of case-by-case adjudication which will ensue should this Court affirm the decision below.

IV.

SINCE BOTH THE VERMONT TRIAL COURT AND THE VERMONT SUPREME COURT CONSIDERED AND DECIDED THE CONSTITUTIONAL ISSUES PRESENTED HERE, D&B'S CLAIMS ARE PROPERLY BEFORE THIS COURT.

Even though Greenmoss never made the argument in the lower courts, it now contends that D&B failed to preserve its First Amendment claims. That contention has no merit. The Vermont trial court based its grant of a new trial on the First Amendment arguments made by D&B. The Vermont Supreme Court quite clearly heard and decided D&B's contention that the First Amendment precludes an award of presumed and punitive damages for libel absent proof of actual malice. (J.A. 36-40)

Under this Court's decisions, "There can be no question as to the proper presentation of a federal claim

when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). "[I]t is irrelevant to inquire how and when a federal question was raised in a court below when it appears that such question was actually considered and decided." *Manhattan Life Insurance Co. of New York v. Cohen*, 234 U.S. 123, 134 (1914); *accord*, *Whitney v. California*, 274 U.S. 357, 360-61 (1927) (setting aside dismissal for want of jurisdiction where the record did not show defendant raised any federal question in state court, but where it appeared that state Court of Appeals had in fact considered and decided the question before the Court); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) ("[W]hether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice."); *Hess v. Indiana*, 414 U.S. 105, 106 n.2 (1973) ("Since the Supreme Court of Indiana considered and resolved each of Hess' constitutional contentions, it is apparent that it regarded Hess' actions in the state courts as sufficient under state law to preserve his constitutional arguments on appeal.").[13]

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[13] See also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967):

> Curtis' constitutional points were raised early enough so that this Court has had the benefit of some ventilation of them by the courts below. The resolution of the merits of Curtis' contentions by the District Court makes it evident that Butts was not prejudiced by the time at which Curtis raised its argument, for it cannot be asserted that an earlier interposition would have resulted in any different proceedings below. Finally the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom." Palko v. State of Connecticut, 302 U.S. 319, 327, 58 S.Ct. 149, 152, 82 L.Ed. 288. Where the ultimate effect of sustaining a

The cases cited by Greenmoss in support of its waiver argument do not hold to the contrary. That argument is, therefore, without merit.

CONCLUSION

Based upon the foregoing, Petitioner Dun & Bradstreet, Inc. respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

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claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.